INFORMATION BULLETIN

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Aggressive Tax Planning: Easing related to Certain Confidentiality Undertakings

On October 15, 2009, a number of measures to combat aggressive tax planning (ATP) schemes more effectively were announced[1]. Among other measures, a compulsory disclosure mechanism was introduced for certain transactions.[2]

Briefly, two types of transactions are covered by this compulsory disclosure mechanism, namely a transaction regarding which the advisor requires confidentiality on the part of his client (confidential transaction) and a transaction for which the advisor's remuneration is conditional on the occurrence of certain events (transaction with conditional remuneration).

More specifically, in relation to a confidential transaction, the compulsory disclosure mechanism stipulates that where a taxpayer, or partnership of which he is a member, carries out a transaction resulting, directly or indirectly, for a taxation year or for a fiscal period, as the case may be, either in a tax benefit of $25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership, as the case may be, of $100 000 or more, where the taxpayer or the partnership of which he is a member retained the services of an advisor concerning such transaction and where the contract between the taxpayer and the advisor, or between the partnership and the advisor, includes, on the part of the taxpayer or of the partnership, an undertaking of confidentiality towards other persons or the tax administration in relation to the transaction, such transaction must be disclosed to Revenu Québec for such taxation year or such fiscal period.

The expression "advisor" regarding a transaction subject to compulsory disclosure means a person, including a partnership, who provides help, assistance or advice regarding the design or implementation of the transaction or who commercializes or promotes it.

For the purposes of this measure, where the contract with the advisor is entered into by a person associated with or related to the taxpayer, or the partnership of which he is a member, on the date when the contract is entered into, it will be deemed to have been entered into by the taxpayer or the partnership of which he is a member. This will also hold for the undertaking of confidentiality, with the necessary adaptations.

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1 MINISTÈRE DES FINANCES DU QUÉBEC, "Fighting Aggressive Tax Planning", *Information Bulletin* 2009-5, October 15, 2009.

2 For the purposes of this bulletin, the expression "transaction" includes a series of transactions.

However, for the purposes of this measure, the undertaking of confidentiality towards other persons does not include a clause designed to ensure that the advisor's professional liability exists only towards his client and according to which a third party may not, for its own purposes, rely on the opinion given by the advisor to his client.

Lastly, the October 15 announcement stipulates that the measures relating to the compulsory disclosure mechanism apply to a transaction carried out after October 14, 2009, but do not apply to a transaction that is part of a series of transactions begun prior to October 15, 2009 and completed before January, 2010.

❑ General application service contracts entered into before March 1, 2010

The practice among many advisors is to enter into a service contract with each client (taxpayer or partnership) applicable to all services supplied during a specified (generally annual) or unspecified period (general application service contract). Accordingly, on October 15, 2009, a multitude of general application service contracts were in force and these contracts could include, on the part of the client, a confidentiality undertaking towards other persons or towards the tax administration in relation to all the services supplied.

Similarly, in the weeks following the October 15 announcement, general application service contracts including such a confidentiality undertaking may have been entered into before advisors had the time to make changes to their contractual documentation.

Accordingly, the existence of such a confidentiality agreement could result, for a taxpayer, in the obligation to disclose to Revenu Québec all the transactions carried out after October 14, 2009 under this service contract (excluding those that are part of a series of transactions begun prior to October 15, 2009 and ended before January 1, 2010), and resulting, directly or indirectly, for a taxation year or for a fiscal period, as the case may be, either in a tax benefit of $25 000 or more for the taxpayer, or in an impact on the income of the taxpayer or the partnership of which he is a member, as the case may be, of $100 000 or more.

Such a situation is not desirable because it does not correspond to the objectives of the compulsory disclosure mechanism.

❑ Grace period

To enable taxpayers to avoid having a transaction be subject to compulsory disclosure as a result of the existing of a confidentiality undertaking given in a general application service contract entered into with an advisor before March 1, 2010, a grace period will be allowed to terminate such confidentiality undertaking.

More specifically, the tax legislation will be amended to stipulate that if a general application service contract entered into before March 1, 2010 between an advisor and a taxpayer or partnership includes, on the part of the taxpayer or partnership, a confidentiality undertaking towards other persons or towards the tax administration in relation to the services supplied by the advisor, and that the parties terminate such confidentiality undertaking before April 15, 2010, such confidentiality undertaking will be deemed, for the purposes of the measures relating to the compulsory disclosure mechanism, to have never existed.

The parties will be considered to have terminated such confidentiality agreement before April 15, 2010 if, before that date, they terminate it in writing or if, before such date, they enter into a new general application service contract in writing that does not include such a confidentiality undertaking and such new contract terminates the earlier general application service contract or if, before such date, the advisor irrevocably waives such confidentiality undertaking given in his favour and so informs the taxpayer or partnership by personal notice or general notice posted on his website.

For greater clarity, a service contract covering one or more specific transactions does not constitute a general application service contract. A service contract covering one or more specific transactions entered into before March 1, 2010 is therefore not covered by this easing measure.

For information concerning the matters dealt with in this information bulletin, contact the Secteur du droit fiscal et de la fiscalité at 418 691-2236.

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